

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32071

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 518
	)	
Plaintiff-Respondent,	)	Filed: July 2, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
JASON RYAN MC DERMOTT,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction and concurrent determinate life sentences for first-degree murder and conspiracy to commit first-degree murder, and consecutive ten-year determinate term as a sentence enhancement for the use of a firearm, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Jason Ryan McDermott appeals his sentences entered after jury verdicts finding him guilty of first-degree murder, conspiracy to commit first-degree murder, and enhancement for use of a firearm in the commission of a felony. Specifically, he claims that the district court abused its discretion by (1) failing to properly consider mitigating factors in determining an appropriate sentence, (2) abandoning its role as a neutral and detached magistrate, and (3) relying on inadmissible evidence at sentencing. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

In early May 2003, Zachariah Street was found dead in the desert south of Boise. The State charged McDermott, Daniel Hosford, and Robroy Wall each with first-degree murder and

conspiracy to commit first-degree murder, and sought sentence enhancements for use of a firearm in the commission of a felony in regard to Street's death.

Daniel Hosford testified at McDermott's trial that he, McDermott, Wall, and Street were all members of the "Italian Familia" gang. Hosford testified that members of the gang were to pass "tests" as part of the gang initiation, including committing vehicle burglaries. Gang members passed the test if they did not get caught or, if they did get caught, they refused to disclose the names of other gang members. Street was arrested on April 4, 2003, for vehicle burglary and identified the other individuals involved. McDermott was angry at Street for having named names and discussed with Hosford and Wall what to do to Street, including shooting him.

On the night of the murder, the four of them drove to the desert. McDermott told Street to take off his hat, shirt, pants, and shoes, which he did when Hosford told him that it was a "test." McDermott then told Street to get down on his knees, "interlock his legs and put his hands behind his back." McDermott placed a shirt over Street's head after Wall suggested that they do so to avoid blood spatter. McDermott then "cocked" the gun and told Street that he "had it on good information that Zach had named names." McDermott asked Street if he was scared, to which he answered that he was not. When McDermott became angry at this response, Street said that he was "a little bit scared." McDermott began tracing the gun around Street's head. When he reached the area near Street's temple, McDermott stated, "[T]here's a certain spot I'm looking for, and it's right there." McDermott then pulled the trigger. Wall then took the gun. McDermott tried to pull the shirt back over Street's head to avoid blood spatter, but was unsuccessful. Wall placed pants over Street's head and then shot him a second time. After firing the second shot, Wall was "hopping around and just laughing" and McDermott hugged him and kissed him on the cheek. McDermott and Wall each hugged Hosford, kissed him on his cheek, and told him that if he told anyone, they would kill him.

McDermott, Wall, and Hosford noticed that they had left footprints, which they attempted to remove. While in the car, they came up with an alibi. The three individuals eventually returned to McDermott's apartment where McDermott played video games. Hosford was arrested the next day and, after initially telling the police the alibi story, later confessed that he, McDermott, and Wall had been involved in the murder.

The State filed a notice of intent to seek the death penalty against McDermott alleging three statutory aggravating circumstances: (1) “[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;” (2) “the defendant exhibited utter disregard for human life;” and (3) “[t]he defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.” McDermott was ultimately found guilty by a jury of all the charges, but the jury was unable to reach a unanimous decision on the statutory aggravating circumstances that would have triggered the death penalty. The court imposed concurrent determinate life sentences for first-degree murder and conspiracy to commit first-degree murder with a consecutive ten-year determinate term as a sentence enhancement for the use of a firearm. McDermott now appeals asserting that the district court abused its sentencing discretion.

## II.

### ANALYSIS

#### A. Neutral and Detached Magistrate

McDermott asserts that the district court abused its discretion at the sentencing hearing by not adhering to “its role as a neutral and detached magistrate.” McDermott cites, as authority for this proposition, cases dealing with applications for search warrants where magistrates are required to assess the existence of probable cause.<sup>1</sup> McDermott also cites the dissenting opinion in an Idaho case regarding the need for a neutral and detached magistrate in the context of a defendant charged by indictment. *State v. Edmondson*, 113 Idaho 230, 245, 743 P.2d 459, 474 (1987) (Bistline, J., dissenting). McDermott has provided no authority specific to a requirement of a neutral and detached magistrate at sentencing. Instead, McDermott generally claims that a sentencing court is required to be objective and it here failed in that regard, based upon one statement made at sentencing.

The district court referred to an incident in which McDermott attempted to take an individual out to kill him but the individual was able to shoot McDermott in the head before McDermott could kill him, and then stated, “[I]t’s unfortunate, Mr. McDermott, that [the shooter] did not succeed, because, if he had, then Zachariah Street would still be alive today.” While crudely stated, we do not read the district court’s statement as condoning anyone’s

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<sup>1</sup> See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979); *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Davis v. State*, 240 S.W.3d 115, 118-19 (Ark. 2006).

murder. The district court's unfortunate choice of words, were meant simply to illustrate its point that but for McDermott and his actions, Street would still be alive. While we do not condone any expression of sentiment regarding the death of any defendant, it is clear from the record that the district court understood the cruel and heinous nature of this crime and was attempting to express the court's strong views in that regard. *See State v. Beam*, 115 Idaho 208, 215, 766 P.2d 678, 685 (1988) (the very nature of the sentencing process in capital cases requires a trial judge to form strong opinions and convictions). The district court did not abuse its discretion at the sentencing hearing by abandoning "its role as a neutral and detached magistrate."

## **B. Privileged Evidence**

During the penalty phase, the district court admitted the words to a song written by McDermott for the jury's consideration. The song had been given by McDermott to his counselor and produced by the counselor, together with her notes, as part of a discovery request. McDermott objected, claiming the song was privileged pursuant to I.R.E. 517, the licensed counselor-client privilege. The State argued that the song was admissible under the exception in I.R.E. 517(d)(5), providing that there is no privilege: "If the communication reveals the contemplation of a crime or harmful act." The district court admitted the song under the exception.

On appeal, McDermott argues that the song did not include the contemplation of a crime or harmful act because it was a therapeutic form of expression with no actual plan of action to carry out the murder of an individual. However, the language of the song speaks of an individual who shot McDermott and clearly evinces contemplation of a retaliatory murder:

It's done. Or so you thought. Too bad I'm a special one. You were startin' to think that I got bought. Too bad kid. You tried, anyway. But now I have to close the lid. While you're in prison you better pray. I got a mark on you. Your life is now mine. Its worth to me is about a Mil or two. An' to everyone else, that's just fine. Sorry kid, you made a blunder. But unlike you. I won't miss. An' when you're buried six feet under. Everyone will know who dealt your Death Kiss.

This communication reveals the contemplation of a crime or harmful act. As this is the only question presented by McDermott on appeal, regarding the song, we express no opinion as to any other parameters of or limitations on I.R.E. 517(d)(5). Therefore, the district court did not abuse its discretion in regard to any reliance it placed upon this evidence at sentencing.

### C. Mitigating Factors

McDermott contends that given any view of the facts, his concurrent determinate life sentences for murder and conspiracy to commit murder, and his consecutive determinate ten-year sentence enhancement for the use of a firearm in the commission of a felony, were excessive. Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). To prevail, an appellant must establish that, under any reasonable view of the facts, the sentence is excessive in light of the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *State v. Cross*, 132 Idaho 667, 671, 978 P.2d 227, 231 (1999). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 170 P.3d 387 (2007).

McDermott does not contend that the sentence exceeds the statutory maximum; rather, he asserts that "his crime is not so egregious that it demands such severe punishment or that he utterly lacks rehabilitative potential." McDermott argues that the district court abused its discretion by failing to properly consider the mitigating factors present in his case. He asserts that had the district court properly considered McDermott's remorse and his traumatic brain injury, it would have imposed a more appropriate sentence.

Testimony was presented during the penalty phase, and McDermott argued at the sentencing hearing before the district court, that McDermott was a "damaged person" as a result of several problems in his life. These problems consisted of having his umbilical cord around his neck as a newborn, being raised in a family with both mental health and substance abuse problems, getting diagnosed as "severely emotionally disturbed" at the age of eleven, living in an "imagined world," being unable to respond to social cues, and receiving a gunshot wound to the

head. Regarding the gunshot wound and resultant brain injury, McDermott's experts testified that he would likely become more paranoid, experience severe disturbances of behavior, and suffer from emotional problems and difficulty controlling his temper.

In its remarks prior to sentencing, the court stated:

In determining the appropriate sentence today, the court considers all the evidence that was presented at the trial, including the death penalty phase of the trial, all information that's been provided in the presentence report and any arguments and statements that I've heard here in the courtroom today, so my decision is based on that information.

The district court weighed heavily the nature of the offense and the character of the offender. The court determined that "this murder was especially heinous, manifesting exceptional depravity." The court commented that this was an "execution" and that it was "shockingly evil." The court noted that McDermott could have killed Street in a different manner, but that he chose to humiliate him by making him bow before McDermott, remove his clothing, and then McDermott moved the gun around Street's head because "that gave [McDermott] pleasure." The court determined that McDermott committed the murder with "utter disregard for human life" and "without sympathy or feeling." The court also commented on McDermott's "lack of conscience regarding the killing," noting that McDermott seemed "happy, relieved" and "showed no remorse." Thus, the district court considered and rejected McDermott's claim of remorse. The district court also considered the mitigating evidence of the gunshot wound to the head. The court stated that McDermott's depravity existed before the gunshot wound. The court noted McDermott's refusal to take responsibility for his conduct and commented that the court did not see "a possibility of rehabilitation."

We conclude that a review of the record does not support McDermott's contention that the sentence imposed was excessive under any view of the facts. While McDermott's arguments regarding his upbringing, traumatic brain injury, and rehabilitative potential may play some role in a sentencing court's determination, a court is not required to assess or balance all of the sentencing goals in an equal manner. *State v. Dushkin*, 124 Idaho 184, 186, 857 P.2d 663, 665 (Ct. App. 1993). The primary consideration is, and presumptively always will be, the good order and protection of society. All other factors are, and must be, subservient to that end. *State v. Hunnel*, 125 Idaho 623, 873 P.2d 877 (1994); *State v. Pederson*, 124 Idaho 179, 857 P.2d 658 (Ct. App. 1993). The court here took the proper factors into consideration, including the

mitigating factors which McDermott argues, when arriving at its conclusion regarding the sentence to impose. Due to the egregious nature of the offense and McDermott's disregard for human life, we conclude that he has failed to establish that the sentence imposed was an abuse of the district court's discretion. *See State v. Windom*, Docket No. 34874 (Ct. App. April 10, 2009) (holding that the nature of the offense, standing alone, may be so severe and egregious so as to support the imposition of a determinate life sentence).

### **III.**

#### **CONCLUSION**

The district court did not abuse its discretion by failing to properly consider mitigating factors, by abandoning "its role as a neutral and detached magistrate," or in regard to any reliance on McDermott's song for sentencing purposes. McDermott's judgment of conviction and sentences are affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**